

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Orig w/ affidavit of mailing

75-1375

To be argued by
DOUGLAS J. KRAMER

*B
P/S*

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1375

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHNNIE A. NORMAN,

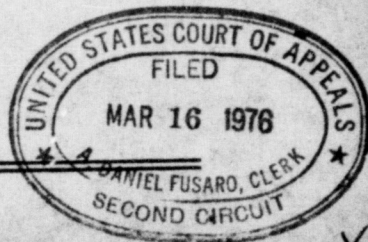
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

JOSEPHINE Y. KING,
DOUGLAS J. KRAMER,
*Assistant United States Attorneys,
Of Counsel.*



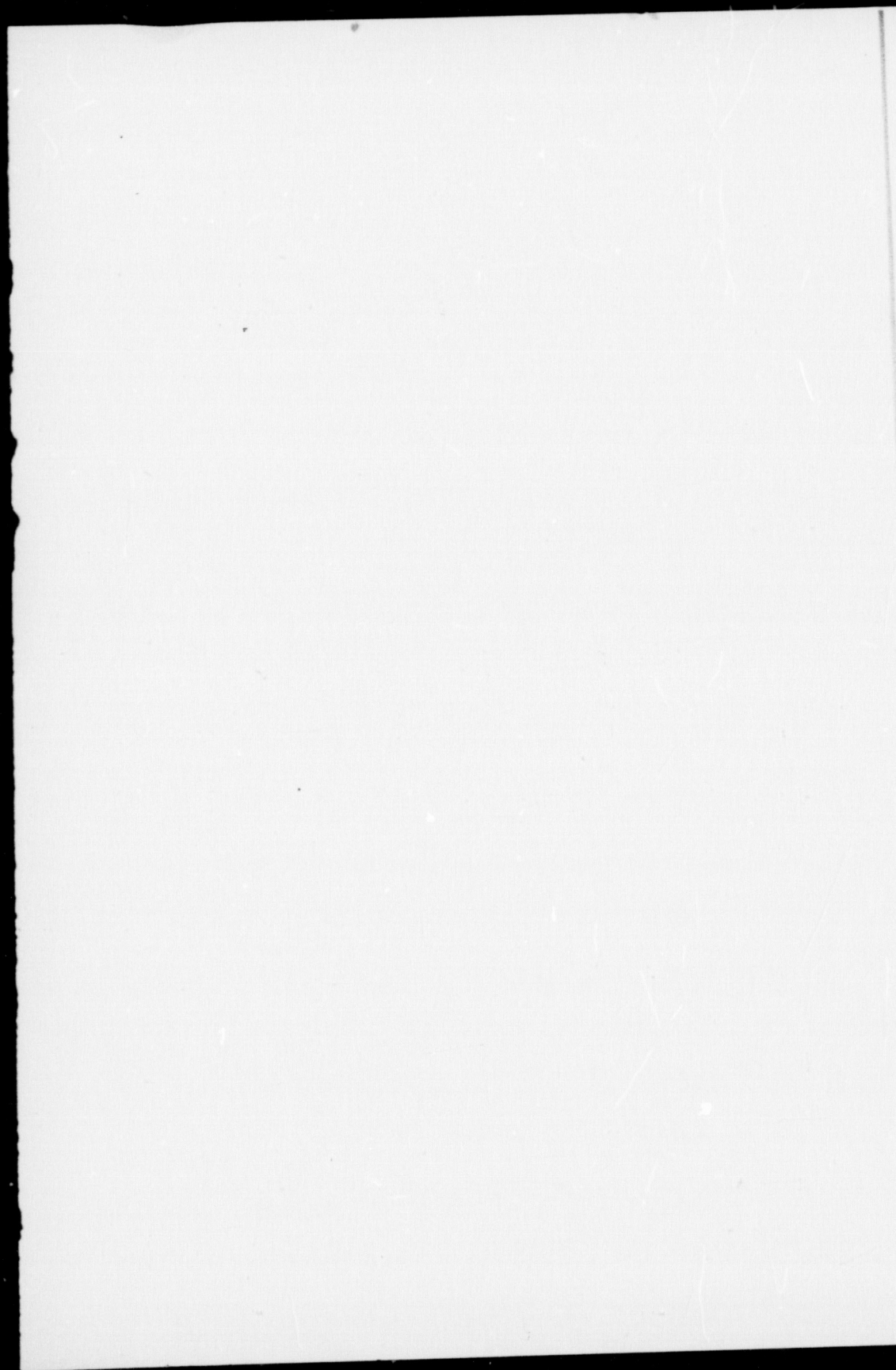


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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1375

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHNNIE A. NORMAN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Johnnie Norman appeals from the judgment of the United States District Court for the Eastern District of New York (Bramwell, *J.*) entered on September 5, 1975, convicting him, following a jury trial, of violating Title 18 U.S.C. §§ 495 & 2, as charged in a one count indictment, in that, on March 5, 1973, Norman and "John Doe" a/k/a "Hank", with intent to defraud the United States did utter and publish a United States Treasury Check, payable to another, upon which the true payee's name had been forged, the defendants knowing the payee's name to be forged.

On June 16, 1975, the defendant John Doe, whose true name was Henry Cain, Jr., pled guilty to a superseding information, charging him with violation of Title 18 U.S.C. § 1003.

Appellant has raised two issues on appeal. He contends that it was reversible error for the trial judge to fail *sua sponte* to order a hearing under title 18 U.S.C. § 4244 as to appellant's mental competence. Appellant also contends that there was insufficient evidence as to his knowledge that the alleged payee and the true payee were not the same person to support the jury verdict.

Statement of the Case

The parties stipulated to the following facts: that the check in question was a check of the United States government; that it was duly issued to a John Mansfield; that it was an obligation of the United States; and that it was duly paid (12).*

The testimony at appellant's trial showed that Norman introduced another man to Norman's automobile insurance broker and vouched for this man's false identity for the purpose of causing the broker to negotiate a Veterans Administration Check.

The true payee, John Mansfield, testified that he regularly received benefits from the Veterans Administration, but had not received his March, 1973 check (15-16). Shown the check in issue (Government's Exhibit No. 2), Mansfield stated he had never seen it before, that it was not his signature on the back and that he had not authorized anybody else to sign for him (17-18). Mansfield had never known the defendant (18).

Marvin Plotnick, defendant Norman's automobile insurance broker, testified to the circumstances surrounding the negotiation of the check. He stated that Norman was

* Numerals in parenthesis refer to pages of the trial transcript.

his client for three and a half years prior to the event at issue (19). On March 5, 1973, Norman came to Plotnick's office and introduced another man as John Mansfield or Johnny (20). Norman informed Plotnick that he knew this other man quite well (21), and that this man was his friend (22). Plotnick then had the other man produce some identification and endorse the check (22).

Plotnick testified that he kept \$200 out of the proceeds of the \$526 check, applying it to Norman's auto insurance (22). The remaining \$326 he gave to the false Mansfield who, in turn, gave some of the remaining cash to Norman (22, 27, 41). While Plotnick testified that he was aware that Norman had been drinking, a not unusual event (29, 31, 34, 37), he did not believe Norman was drunk on March 5, 1973 (30, 31, 32).

Secret Service Agent Charles J. Quinn testified that he interviewed Norman on April 17, 1974 at which time, after some hedging, Norman admitted that he knew nobody by the name of John Mansfield and never knew Hank to be John Mansfield (89). Norman admitted that Hank had cashed the check (88).

The appellant testified in his own defense, admitting that he knew Hank, the man who cashed the check, for three to four years prior to the events of March 5, 1973 (145). Defendant claimed that on the day in question he believed that Hank had authority to cash the check (157, 159).

Norman's sister, Jessie Witherspoon, testified that Norman couldn't read or write (198). James F. Veal, a Legal Aid Society investigator, testified that the broker knew Norman for fifteen years (201).

ARGUMENT

POINT I

The Trial Judge did not abuse his discretion in not ordering a hearing pursuant to Title 18 U.S.C. § 4244.

Following the prosecution's case, counsel for Norman informed the court that she "had a little bit of a problem with the defendant. . . ." She then went on to make a brief statement that Norman had "some problems" with alcohol and that someone had informed her that he had suffered an epileptic seizure the previous night (132). Defense counsel stated that she had a "bit of difficulty" in determining whether or not Norman freely comprehended the situation (131).

Appellant now argues, for the first time, that the trial court should have ordered a hearing under Title 18, U.S.C., § 4244 as to his mental competence. Legal Aid trial counsel never requested a hearing during trial and, indeed, the entire matter was thoroughly discussed and apparently resolved in favor of continuing the trial without any objection from appellant's attorney.*

The court noted that it had observed no difficulty in communication with the defendant and that Norman "has been quiet and when [defense counsel] spoke to him he apparently responded" (132-133). The trial judge further noted that

"Well, in court, there has been times when witnesses said something and he has been very alert and he has been very responsive. He responded

* The entire colloquy concerning Norman's competence (132-142), is reproduced in the Government's Appendix.

by facial expressions and sometimes by statements" (133).

After some additional discussion, the trial judge noted:

"Well, the Court has seen nothing and evidently, from what you tell me, you have seen nothing.

Ms. Seybert: Not specifically" (134).

After being told by defense counsel that there was a doctor, a potential defense witness, in court, the court suggested that he might examine the defendant (135-137). The record is silent as to whether any examination took place and there is nothing in the record to indicate that this doctor brought any additional information to the attention of the court.

The trial judge next inquired if Norman was drunk (137). Defense counsel replied:

"No, I can't smell alcohol on his breath" (137).

Subsequently, the trial judge inquired.

"Has alcohol impaired his ability to communicate with you since on trial in this case?

Ms. Seybert: No.

The Court: Now, Tuesday and Wednesday we were on trial and today is Thursday. On any of these three days do you want to say this man was drunk and unable to attend to himself?

Ms. Seybert: No.

The Court: Was he lucid then?

Ms. Seybert: Yes (138).

Significantly, no motion was made by the defendant or his counsel for any further examination and the question of Norman's competence to stand trial does not appear to have been raised thereafter.

The test for incompetency under the statute is set forth in *Dusky v. United States*, 362 U.S. 402 (1960):

"[The] test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

Norman now claims that the record reveals that the court had such facts before it to create a reasonable cause to believe that Norman was not mentally competent to understand the charges against him or properly to assist in his own defense.

Whether a hearing need be held under Title 18 U.S.C. § 4244 lies within the sound discretion of the trial court. *Zovluck v. United States*, 448 F.2d 339, 342 (2d Cir.), *cert. denied*, 405 U.S. 1043 (1972); *United States v. Curtis*, 520 F.2d 1300, 1304 (1st Cir. 1975). A hearing is required only if it is "manifest that there is reasonable cause to believe the defendant is incompetent." *United States v. Marshall*, 458 F.2d 446, 450 (2d Cir. 1972).

In determining whether a competency hearing is called for, the Court's first hand observations of the defendant are important. *United States v. Vowteras*, 500 F.2d 1210 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); *Mirra v. United States*, 379 F.2d 782, 787 (2d Cir.), *cert. denied*, 389 U.S. 1022 (1967); *United States v. Curtis*, *supra*, 520 F.2d at 1304. In the instant case, the Court observed Norman to be lucid at all times (138) and able to communicate with counsel (132-133).

Norman's history of epilepsy and alcoholism was brought to the attention of the Court, along with the allegation that he had a seizure the night before and had taken medication. Epilepsy and alcoholism, even when combined, do not necessarily lay a foundation for a claim

of incompetency. *United States v. Bradley*, 463 F.2d 808, 811-812 (D.C. Cir. 1972). Here, counsel for Norman merely informed the Court of what others had told her and offered no personal knowledge of any incapacity on the part of the defendant.

In the instant case, the court was presented with no factual information concerning Norman's present mental state which might negative its first hand observations and raise even a suspicion that Norman was incompetent. This is to be contrasted with the record before the court in *United States v. Polisi*, 514 F.2d 977 (2d Cir. 1975), cited by appellant. There the court had before it a psychiatric history detailed in a presentence report concerning Polisi's chronic undifferentiated schizophrenia associated with trauma and psychotic reaction. In addition, the Court, in *Polisi*, had the conclusion of an examining psychiatrist that outpatient psychiatric care was indicated and medication was necessary. This information was sufficient to give rise to a reasonable cause to believe that the defendant might be incompetent. *Polisi, supra*, 514 F.2d at 980. See also *Saddler v. United States*, — F.2d — (Slip Opinion, 2d Cir., p. 2063, decided February 20, 1976) where the court had before it a report on the defendant's history of mental illness and attempted suicide.

The Court's determination not to proceed under Title 18, U.S.C., § 4244 *sua sponte* was subsequently supported by Norman himself. He took the stand and testified in a lucid and comprehensible manner (142-194). In his testimony, Norman fabricated a defense to the effect that the actual negotiator of the check, "Hank", owed him money and that Norman took Hank to his broker so that Hank could satisfy the debt (169). Norman maintained that he did not know whose name was on the check (169). Norman also claimed he was drinking on the day in question (180). On cross-examination Norman denied that

he introduced Hank to Plotnick, the broker, as "John Mansfield" (165). It is clear from the foregoing testimony that Norman understood the factual issues which were significant to the proof of his guilt and that his explanations and denials were aimed at weakening the prosecution's case.

POINT II

There was sufficient evidence, that Norman knew that his partner was not the true payee and had forged the endorsement, to support the verdict of the jury.

In determining whether there was sufficient evidence to sustain the verdict, the Court will view the evidence in the light favorable to the government, *e.g.*, *United States v. Castellena*, 349 F.2d 264, 267 (2d Cir.), *cert. denied*, 383 U.S. 928 (1966).

Appellant argues that there was no evidence that he actually knew the name of the real payee and therefore that his partner had forged the check. But at the trial, Plotnick testified that Norman introduced his partner as John Mansfield, and that his partner was a friend whom he knew well (20, 21, 22). Secret Service Agent Quinn testified that Norman initially maintained the identification of his partner as "John Mansfield" (87). After further questioning, Norman admitted that he knew nobody by the name of John Mansfield, had never met Mr. Mansfield, and had never known Hank to be John Mansfield (89). This testimony was more than adequate to support a finding by the jury that when Norman took his partner to cash the stolen check at Plotnick's office, he knew the check to be drawn to John Mansfield, a name he had no other reason to know, and he knew his partner was not John Mansfield. *Cf.*, *United States v. Wood*, 406

F.2d 615, 616 (4th Cir. 1969); *Cotton v. United States*,
409 F.2d 1049, 1053 (10th Cir.), *cert. denied*, 396 U.S.
1016 (1970).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: March 16, 1976

DAVID G. TRAGER,
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Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

----- EVELYN COHEN -----, being duly sworn, says that on the 16th
day of March, 1976, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a BRIEF FOR THE APPELLEE
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Wm. J. Gallagher, Esq.

Legal Aid Society
Fed. Defender Services Unit

509 U.S. Courthouse
Foley Square

New York, N.Y. 10007

Sworn to before me this
16th day of March, 1976

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

Evelyn Cohen